Alma Nudo Atenza v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–94–05 OF 2017(B) AND 05–193–08 OF 2017(W)
RICHARD MALANJUM CHIEF JUSTICE, DAVID WONG CJ (SABAH AND SARAWAK), RAMLY ALI, BALIA YUSOF, ALIZATUL KHAIR, ROHANA YUSUF, TENGKU MAIMUN, ABANG ISKANDAR AND NALLINI PATHMANATHAN FCJJ
5 APRIL 2019

Constitutional Law — Legislature — Constitutionality of statute — Whether s 37A of the Dangerous Drugs Act 1952 ('the DDA') unconstitutional — Whether s 37A's permitted use of 'presumption upon presumption' against accused in drug trafficking trials breached art 5(1) read with art 8(1) of the Federal Constitution — Whether use of 'deemed possession' under s 37(d) of the DDA to invoke presumption of trafficking under s 37(da) of the DDA denied accused of fair trial and breached rule that prosecution must prove guilt of accused beyond reasonable doubt — Whether requiring accused to discharge legal burden of rebutting the presumptions on balance of probabilities violated his right to presumption of innocence and risked his conviction even though a reasonable doubt as to his guilt might have existed — Whether failure of Act that created s 37A to change any of the original wordings in ss 37(d) and (da) of the DDA meant Federal Court's decision in Muhammed bin Hassan v Public Prosecutor [1998] 2 MLJ 273 on the operation of those two sections remained valid — Whether apex court's ruling remained unaffected that trafficking presumption under s 37(da) could only be invoked if trial court had affirmatively found on the evidence that accused was in possession of the drugs

Constitutional Law — Constitution — Federal Constitution ('the FC') — Proportionality — Whether legislative objective of inserting s 37A into DDA satisfied test of proportionality housed in art 8(1) of the FC — Whether objective of securing drug trafficking convictions through enactment of s 37A did not justify breach of accused's right to presumption of innocence under art 5(1) of the FC — Whether enactment of s 37A permissible exercise of legislative power and not an intrusion into domain of judicial power as it did not seek to overrule a landmark decision of the Federal Court but only to alter the law upon which that decision was based

The central issue in the two appeals herein was whether s 37A of the Dangerous Drugs Act 1952 ('the DDA') was constitutional vis a vis arts 5, 8 and 121 of the Federal Constitution ('the FC'). Section 37A was introduced by a 2014 amendment to the DDA to allow the presumptions in s 37(d) and s 37(da) of

the DDA to be applied together against an accused in a drug trafficking trial. Section 37A read: 'Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law'. Section 37(d) stipulated that any person found to have in his custody or control anything which contained a dangerous drug was deemed, until the contrary was proven, to be in possession of the drug and to also know of the nature of the drug. Section 37(da) provided that any person who was found in possession of a stipulated weight or more of a dangerous drug (as set out in that section) was presumed, until the contrary was proven, to be trafficking in the drug. The amendment that introduced s 37A did not change any of the original wordings in either s 37(d) or 37(da) although the purpose was to overcome the effect of the Federal Court's decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 which held that based on the clear wordings in the two sections, the presumption of possession under s 37(d) could not be used to invoke the presumption of trafficking under s 37(da). The court held that the presumption of trafficking under s 37(da) could only be invoked if the trial court had made an express affirmative finding that the accused was in possession of the drug based on the evidence. The appellants, who were charged with drug trafficking offences after the coming into force of s 37A, were convicted and sentenced to death by the High Court after being found guilty. Their appeals against conviction and sentence were dismissed by the Court of Appeal ('CA'). Prime among the several grounds raised in their instant appeals against the CA's decision was their common challenge to the constitutionality of s 37A on the ground that it contravened the principle of separation of powers and also violated arts 5 and 8 of the FC. At the start of the hearing of the appeals, the respondent raised the preliminary objection that the appellants had not obtained leave of the Federal Court under art 4(4) of the FC to challenge the constitutional validity of s 37A. The appellants replied that no leave was required because they were not challenging the legislative competence of Parliament to enact s 37A but only that s 37A had usurped the judicial power of the Federation in violation of art 121 of the FC because it had reversed and nullified the decision of the Federal Court in *Muhammed bin Hassan*.

Held, unanimously dismissing the respondent's preliminary objection, quashing the drug trafficking convictions and sentences of both the appellants and convicting them for possession of the drugs under s 12(1) of the DDA:

(1) Section 37A was unconstitutional for violating art 5(1) read with art 8(1) of the Federal Constitution and was hereby struck down (see para 151).

(2) Section 37A had the effect that once the prosecution proved that an accused had custody and control of a thing containing a dangerous drug, the accused was presumed to have possession and knowledge of the drug under s 37(d). That 'deemed possession' was then used to invoke a further

presumption of trafficking under s 37(da) if the quantity of the drug exceeded the statutory weight limit. Section 37A thus permitted a 'presumption upon a presumption'. As such, for a charge of drug trafficking all that was required of the prosecution to establish a prima facie case was to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifted to the accused to disprove the presumptions of possession and knowledge and trafficking on a balance of probabilities. Hence, s 37A prima facie violated the presumption of innocence since it permitted an accused to be convicted while a reasonable doubt as to his guilt might have existed (see paras 139 & 141).

(3) The accused did not bear merely an evidential burden to rebut the presumptions under ss 37(d) and (da) but had a legal burden to do so on a balance of probabilities. This was a grave erosion to the presumption of innocence housed in art 5(1) of the Federal Constitution. But the most severe effect, tantamount to being harsh and oppressive, that arose from the application of a 'presumption upon a presumption' was that the presumed element of possession under s 37(d) was used to invoke the presumption of trafficking under s 37(da) without any consideration that the element of possession in s 37(da) required a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entailed an affirmative finding of possession based on adduced evidence as was held in *Mohammed bin Hassan* (see paras 146–147).

(4) Section 37A was legislated to facilitate the invocation of the two presumptions, yet there was no amendment to the wordings in s 37(da), in particular, the word 'found' therein. As such, the view of the Federal Court on the word 'found' in *Muhammed bin Hassan* was still valid. It was held in that case that based on the clear and unequivocal meaning of the statutory wordings, 'deemed possession' under s 37(d) could not be equated to 'found possession' so as to invoke the presumption of trafficking under s 37(da). Despite the enactment of s 37A, a plain reading of the words in sub-s (d) and (da) of s 37 did not permit the concurrent application of both the presumptions in the prosecution of a drug trafficking offence. To invoke the presumption of trafficking founded not on proof of possession but on presumed possession based on proof of mere custody and control of anything that contained a dangerous drug constituted a grave and unjustified departure from the general rule that the prosecution was required to prove the guilt of the accused beyond a reasonable doubt. It gave rise to a real risk that an accused might be convicted of drug trafficking in circumstances where a significant reasonable doubt remained as to the main elements of the offence (see paras 116, 128 & 148–149).

(5) Section 37A was disproportionate to the legislative objective it served. It was far from clear that the objective of securing the convictions of drug traffickers could not be achieved through other means less damaging to the accused's fundamental right under art 5 of the Federal Constitution. In the light of the seriousness of the offence and the punishment it entailed, the unacceptably severe incursion into the right of the accused under art 5(1) was disproportionate to the aim of curbing crime and hence failed to satisfy the requirement of proportionality housed under art 8(1) of the Federal Constitution (see paras 143 & 150).

(6) Since the trial judges in the two appeals herein had invoked both the presumptions to find the appellants guilty of trafficking, their convictions and sentences under s 39B of the DDA were quashed. As there was no challenge to the use of a single presumption in these appeals, the invocation of s 37(d) by the trial judges did not cause any miscarriage of justice to the detriment of the appellants. This court had no reasonable doubt as to the guilt of the appellants for possession of the drugs based on the evidence adduced; accordingly, the appellants were convicted for possession of the drugs under s 12(1) of the DDA and punishable under s 39A(2) of the DDA (see paras 152–153).

(7) The appellants' challenge to the constitutionality of s 37A based on the doctrine of separation of powers failed. Section 37A did not purport to overrule the Federal Court's decision in *Muhammed bin Hassan* but only to comply with the apex court's opinion therein that 'presumption upon presumption' could only be permitted if, upon the wordings in the two subsections, such an intention of Parliament was clear. The finality of the decision in that case in respect of the rights and liabilities of the parties was not affected by the introduction of s 37A. The amendment to introduce s 37A was to alter generally the law upon which the decision in that case was based. Such an amendment was a permissible exercise of legislative power and did not encroach into the realm of judicial power (see paras 88–89).

(8) The respondent's preliminary objection had no merit. The appellants did not require leave of the Federal Court as their challenge did not fall within the scope of art 4(4) of the Federal Constitution as the validity of s 37A was not being challenged on the ground that it related to a matter on which Parliament had no power to make laws. The basis of the appellants' challenge to s 37A was that by enacting s 37A to reverse the decision of the Federal Court in *Muhammed bin Hassan*, Parliament had usurped the judicial power of the Federation and fallen foul of art 121(1) of the Federal Constitution (see paras 61–62).

A **[Bahasa Malaysia summary**

Isu utama dalam dua rayuan ini adalah sama ada s 37A Akta Dadah Berbahaya 1952 ('ADB tersebut') bersifat perlembagaan melalui perkara 5, 8 dan 121 Perlembagaan Persekutuan ('PP'). Seksyen 37A telah diperkenalkan oleh pindaan 2014 kepada ADB tersebut untuk membenarkan andaian dalam s 37(d) dan 37(da) ADB tersebut terpakai bersama terhadap tertuduh dalam perbicaraan pengedaran dadah. Seksyen 37A dibaca: 'Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law'. Seksyen 37(d) menyatakan bahawa mana-mana orang yang didapati mempunyai dalam jagaan atau kawalannya apa-apa yang mengandungi dadah berbahaya adalah dianggap, sehingga sebaliknya dibuktikan, mempunyai milikan dadah itu dan juga mengetahui sifat dadah itu. Seksyen 37(da) memperuntukkan bahawa mana-mana orang yang didapati memiliki berat yang dinyatakan atau lebih untuk suatu dadah berbahaya (sepertimana dinyatakan dalam seksyen tersebut) adalah diandaikan, sehingga sebaliknya dapat dibuktikan, mengedar dadah. Pindaan yang memperkenalkan s 37A tidak mengubah apa-apa perkataan dalam dua seksyen tersebut, andaian milikan di bawah s 37(d) tidak boleh digunakan untuk membuat andaian pengedaran di bawah s 37(da). Mahkamah memutuskan bahawa andaian pengedaran di bawah s 37(da) hanya boleh digunakan jika mahkamah telah membuat dapatan afirmatif yang nyata bahawa tertuduh memiliki dadah berdasarkan keterangan. Perayu-perayu, yang dituduh dengan kesalahan pemilikan dadah selepas s 37A mula berkuat kuasa, telah disabitkan dan dihukum mati oleh Mahkamah Tinggi setelah didapati bersalah. Rayuan-rayuan mereka terhadap sabitan dan hukuman telah ditolak oleh Mahkamah Rayuan ('MR'). Keutamaan antara beberapa alasan yang ditimbulkan dalam rayuan-rayuan mereka ini terhadap keputusan MR adalah cabaran sama mereka berhubung keperlembagaan s 37A atas alasan bahawa ia bertentangan dengan prinsip pengasingan kuasa dan juga melanggar perkara 5 dan 8 PP. Di permulaan perbicaraan rayuan-rayuan itu, responden telah menimbulkan bantahan awal baawa perayu-perayu tidak memperoleh kebenaran Mahkamah Persekutuan di bawah perkara 4(4) PP untuk mencabar kesahan keperlembagaan s 37A. Perayu-perayu menjawab bahawa tiada kebenaran diperlukan kerana mereka tidak mencabar kempetensi badan perundangan Parlimen untuk menggubal s 37A tetapi hanya bahawa s 37A telah melampaui kuasa kehakiman Persekutuan yang melanggar perkara 121 PP kerana ia telah mengakas dan membatalkan keputusan Mahkamah Persekutuan dalam kes *Muhammed bin Hassan*.

Diputuskan, sebulat suara menolak bantahan awal responden, membatalkan sabitan dan hukuman pengedaran dadah kedua-dua perayu dan mensabitkan mereka kerana milikan dadah di bawah s 12(1) ADB:

(1) Seksyen 37A adalah tidak berperlembagaan kerana melanggar

perkara 5(1) dibaca bersama dengan perkara 8(1) PP dan dengan itu dibatalkan (lihat perenggan 151).

(2) Seksyen 37A mempunyai kesan di mana jika pendakwaan telah membuktikan bahawa tertuduh mempunyai jagaan dan kawalan sesuatu yang mengandungi dadah berbahaya, tertuduh adalah diandaikan mempunyai milikan dan pengetahuan tentang dadah itu di bawah s 37(d). Istilah 'deemed possession' kemudian akan digunakan untuk selanjutnya membuat andaian pengedaran di bawah s 37(da) jika kuantiti dadah yang dieskhibitkan melebihi had berat statutori. Seksyen 37A dengan itu membenarkan satu 'presumption upon a presumption'. Oleh demikian, untuk satu pertuduhan pengedaran dadah pendakwaan perlu membuktikan kes prima facie bagi membuktikan jagaan dan kawalan di pihak tertuduh dan berat dadah. Beban undang-undang kemudian dipindahkan kepada tertuduh untuk membuktikan sebaliknya andaian milikan dan pengetahuan dan pengedaran tersebut atas imbangan kebarangkalian. Justeru, s 37A secara prima facie telah melanggar andaian kejujuran oleh kerana ia membenarkan tertuduh disabitkan sedangkan satu keraguan munasabah berhubung kebersalahannya mungkin wujud (lihat perenggan 139 & 141).

(3) Tertuduh bukan sahaja mananggung beban keterangan untuk mematahkan andaian di bawah ss 37(d) dan (da) tetapi mempunyai beban undang-undang untuk berbuat demikian atas imbangan kebarangkalian. Ini akan melemahkan andaian kejujuran yang termaktub dalam perkara 5(1) PP. Namun kesan paling teruk, sama seperti berlaku kejam dan menindas, yang timbul daripada permohonan 'presumption upon a presumption' adalah bahawa andaian elemen milikan di bawah s 37(d) digunakan untuk membuat andaian pengedaran di bawah s 37(da) tanpa apa-apa pertimbangan bahawa elemen milikan dalam s 37(da) menghendaki suatu 'found' milikan dan bukan 'presumed' milikan. Ungkapan 'any person who is found in possession of' membawa kepada dapatan untuk milikan berdasarkan keterangan yang dikemukakan sebagaimana diputuskan dalam kes *Mohammed bin Hassan* (lihat perenggan 146–147).

(4) Seksyen 37A digubal untuk memudahkan penggunaan dua andaian, namun tiada pindaan telah dibuat kepada perkataan-perkataan dalam s 37(da), khususnya, perkataan 'found'. Oleh itu, pendapat Mahkamah Persekutuan berhubung perkataan 'found' dalam kes *Muhammed bin Hassan* adalah masih terpakai. Ia diputuskan dalam kes tersebut bahawa berdasarkan maksud yang jelas dan menyeluruh istilah statutori, 'deemed possession' di bawah s 37(d) tidak boleh disamakan dengan 'found possession' untuk menggunakan andaian pengedaran di bawah s 37(da). Walaupun dengan penggubalan s 37A, pembacaan biasa istilah-istilah

dalam sub-s (d) dan (da) kepada s 37 tidak membenarkan pemakaian serentak untuk kedua-dua andaian dalam pendakwaan bagi satu kesalahan pengedaran dadah. Untuk menggunakan andaian pengedaran yang tidak didapati berdasarkan bukti milikan tetapi atas andaian milikan berdasarkan bukti jagaan dan kawalan sahaja untuk apa-apa yang mengandungi dadah berbahaya merupakan suatu ayng terpesong dan tidak wajar daripada rukun am bahawa pendakwaan dikehendaki membuktikan kebersalahan tertuduh melampuai keraguan munasabah. Ia menimbulkan risiko sebenar bahawa tertuduh mungkin disabitkan kerana mengedar dadah dalam keadaan di mana keraguan munasabah yang ketara kekal sebabgai elemen utama kesalahan (lihat perenggan 116, 128 & 148–149).

(5) Seksyen 37A tidak sesuai dengan objektif badan perundangan bagi tujuan tersebut. Ia jauh daripada jelas bahawa objektif untuk menjamin sabitan pengedar dadah tidak boleh tercapai melalui cara lain yang kurang menjejaskan hak asasi tertuduh di bawah perkara 5 PP. Berdasarkan keseriusan kesalah dan hukumannya, pemakaian yang tidak boleh diterima terhadap hak tertuduh di bawah perkara 5(1) adalah tidak sesuai bagi tujuan membanteras jenayah dan justeru gagal untuk memenuhi keperluan saksama yang termaktub di bawah perkara 8(1) PP (lihat perenggan 143 & 150).

(6) Oleh kerana hakim perbicaraan dalam dua rayuan ini telah menggunakan kedua-dua andaian untuk mendapati perayu-perayu bersalah kerana pengedaran, sabitan dan hukuman mereka di bawah s 39B ADB telah dibatalkan. Oleh kerana tiada cabaran untuk menggunakan satu andaian dalam rayuan-rayuan tersebut, penggunaan s 37(d) oleh hakim perbicaraan tidak menyebabkan apa-apa pelaksanaan yang tidak adil berlaku yang menjejas perayu-perayu. Mahkamah ini tiada keraguan munasabah berhubung kebersalahan perayu-perayu untuk milikan dadah berdasarkan keterangan yang dikemukakan; sewajarnya, perayu-peryu telah disabitkan kerana milikan dadah di bawah s 12(1) ADB dan boleh dihukum di bawah s 39A(2) ADB (lihat perenggan 152–153).

(7) Cabaran perayu-perayu terhadap keperlembagaan s 37A berdasarkan doktrin pengasingan kuasa telah gagal. Seksyen 37A tidak bermaksud untuk membatalkan keputusan Mahkamah Persekutuan dalam kes *Muhammed bin Hassan* tetapi hanya untuk mematuhi pendapat mahkamah tertinggi bahawa 'presumption upon presumption' hanya boleh dibenarkan jika, berdasarkan kata-kata dalam dua subseksyen itu, niat Parlimen adalah jelas. Kemuktamadan keputusan dalam kes tersebut berkaitan hak dan liabiliti pihak-pihak tidak terjejas dengan pengenalan s 37A. Pindaan untuk memperkenalkan s 37A adalah untuk mengubah pada amnya undang-undang yang mana menjadi asas keputusan dalam

kes tersebut. Pindaan sedemikian adalah amalan yang dibenarkan bagi kuasa badan perundangan dan tidak memasuki skop kuasa kehakiman (lihat perenggan 88–89).

(8) Bantahan awal responden tidak mempunyai merit. Perayu-perayu tidak memerlukan kebenaran Mahkamah Persekutuan kerana cabaran mereka tidak terjatuh dalam skop perkara 4(4) PP kerana kesahan s 37A tidak dicabar atas alasan bahawa ia berkaitan dengan perkara yang mana Parlimen tidak mempunyai kuasa untuk membuat undang-undang. Asas cabaran perayu-perayu terhadap s 37A adalah bahawa dengan menggubal s 37A untuk mengakas keputusan Mahkamah Persekutuan dalam kes *Muhammed bin Hassan*, Parlimen telah melampaui kuasa kehakiman Persekutuan dan melanggar perkara 121(1) PP (lihat perenggan 61–62).]

Notes

For cases on constitutionality of statute, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3189–3191.

For cases on Federal Constitution, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2584–2593.

Cases referred to

A-G of Hong Kong v Lee Kwong-Kut [1993] AC 951, PC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, FC (refd)

Bugdaycay v Secretary of State for the Home Department [1987] AC 514, HL (refd)

Cauvery Water Disputes Tribunal [1993] Supp 1 SCC 96 (II), SC (refd)

Cheviti Venkanna Yadav v State of Telangana [2017] 1 SCC 283, SC (refd)

DPP v Mollison (No 2) [2003] UKPC 6, PC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)

East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia [1980] 2 MLJ 143, FC (refd)

Gerald Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262, FC (refd)

Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417,FC (refd)

Hinds v The Queen [1977] AC 195, PC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Indira Nehru Gandhi v Shri Raj Narain [1975] 2 SCC 159, SC (distd)

Janapada Sabha Chhindwara v The Central Provinces Syndicate Ltd [1970] 1 SCC 509, SC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Maneka Gandhi v Union of India [1978] AIR 597, SC (refd)
Matadeen v Pointu [1998] UKPC 9, PC (refd)
Medical Council of India v State of Kerala (Writ Petition (C) No 178 & 231 of 2018), SC (distd)
Mohamad Ezam bin Mohd Nor, In Re [2001] 3 MLJ 372, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
Ooi Kean Thong & Anor v PP [2006] 3 MLJ 389, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
R (on the application of Anderson) v Secretary of State for the Home Department [2002] UKHL 46, HL (refd)
R v Johnstone [2003] UKHL 28, HL (refd)
R v Kirby; Ex parte Boilermakers' Society of Australia [1956] ALR 163, HC (refd)
R v Lambert [2001] UKHL 37, HL (refd)
R v Oakes [1986] 1 SCR 103, SC (consd)
R v Whyte (1988) 51 DLR 4th 481, SC (folld)
Rethana v Government of Malaysia [1984] 2 MLJ 52, FC (refd)
SR Bhagwat v State of Mysore [1995] 6 SCC 16, SC (refd)
ST Sadiq v State Of Kerala [2015] 4 SCC 400, SC (distd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Shaw v Director of Public Prosecutions [1962] AC 220, HL (refd)
Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2005] 1 All ER 237, HL (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors [2015] 6 MLJ 736, FC (refd)
State of Haryana v Karnal Co-Op Farmers's Society Ltd [1993] 2 SCC 363, SC (refd)
State v Coetzee [1997] 2 LRC 593 (refd)
State v Makwanyane [1995] 1 LRC 269 (refd)
Syarikat Banita Sdn Bhd v Government of State of Sabah [1977] 2 MLJ 217, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
The State v Khoyratty [2006] UKPC 13, PC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri &

Ors [2014] 4 MLJ 765, FC (refd)
Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan [1932] ALR 22, HC (refd)
Woolmington v Director of Public Prosecutions [1935] AC 462, HL (refd)
Yeoh Tat Thong v Government of Malaysia & Anor [1973] 2 MLJ 86 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)
Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 2, 12(1), 37, 37(d), (da), (da)(ix), (da)(xvi), 37A, 39A(2), 39B
Federal Constitution arts 4(1), (3), (4), 5, 5(1), 8, 8(1), 9, 10, 11, 74(1), 75, 121, 121(1), 128(1)(a), 160(2), Federal List, items 3, 4, Part II
Indian Constitution [IND] art 329A, 329A(4)
Interpretation Acts 1948 and 1967 s 66
Kerala Cashew Factories (Acquisition) Act 1974 [IND]
Kerala Professional Colleges (Regularisation of Admission in Medical Colleges) Ordinance 2017 [IND]

Appeal from: Criminal Appeal Nos B-05(M)-132–04 of 2016(PHL) and W-05(M)-389–10 of 2016 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Srimurugan Alagan, Surjan Singh, R Kengadharan, Jamil Mohamed Shafie, Emily Wong, Magita Hari Mogan, Yasmeen Soh, How Li Nee, Nursyazwani Ilyana bt Iskandar Dzulkarnain, Hussein bin Akhtar and Sathiswaranji a/l Samy with him) (Srimurugan & Co) in Criminal Appeal No 05–94–05 of 2017(B) for the appellant.
Gopal Sri Ram (A Jeyaseelen, Rajpal Singh, Emily Wong, Magita Hari Mogan, Yasmeen Soh and How Li Nee with him) (A Jeyaseelen & Co) in Criminal Appeal No 05–193–08 of 2017(W) for the appellant.
Nik Suhaimi bin Nik Sulaiman (Mohd Dusuki bin Mokhtar, Ku Hayati bin Ku Haron and Hamdan bin Hamzah with him) (Attorney General's Chambers) for the respondent.

Richard Malanjum Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] The common and central issue in the present appeals is on the constitutional validity of s 37A of the Dangerous Drugs Act 1952 ('the DDA'), with reference to arts 5, 8 and 121 of the Federal Constitution ('the FC').

[2] Each of the appellants in these two appeals was charged before and convicted by two different trial judges for drug trafficking under s 39B of the

DDA. However, since both appeals were premised on one common and crucial issue we proceeded to hear them together while conscious of the fact that on merits these two appeals might differ. We therefore heard submissions on the common issue of these two appeals.

[3] This is a unanimous judgment of the remaining judges of the court delivered pursuant to s 78(1) of the Courts of Judicature Act 1964. Mr Justice Balia Yusof bin Hj Wahi has since retired on 25 March 2019.

THE SALIENT FACTS

Criminal Appeal No 05–94–05 of 2017(B) ('the first appeal')

[4] The charge against the appellant in the first appeal ('the first appellant') read as follows:

> Bahawa kamu pada 19 Ogos 2014 lebih kurang jam 2.00 pagi di Cawangan Pemeriksaan Penumpang 2 (CPP2) Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), di dalam negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 2556.4 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[5] The first appellant, a national of the Republic of the Philippines, travelled from Hong Kong to Malaysia by flight on 19 August 2014. Upon her arrival at KLIA at about 2am a customs enforcement officer ('PW3') saw the first appellant in the queue and had her bag ('P7') scanned. Upon scanning PW3 saw a suspicious image inside the bag. He requested a customs officer ('PW6') to examine the bag further.

[6] On physical examination of the contents of the bag, PW6 discovered that it contained several new handbags. He then removed one of the handbags for scanning. PW3 saw a suspicious image inside the handbag. He requested PW6 to place the handbag back into the bag. The first appellant and the bag were then brought to an examination room where they were handed over to an investigating officer ('PW7').

[7] Instructed by PW7, PW6 conducted a search of the bag in the presence of the first appellant. The bag was found to contain clothings, shoes and nine packages of handbags wrapped in clear plastic. Each handbag was found to contain four packages, wrapped with yellow coloured tape and concealed inside the inner back cover of each of the handbags. A total of 36 packages were recovered from the nine handbags. Each package contained crystalline substance.

[8] Using a test kit, PW6 found that the substance in each package tested positive for methamphetamine. The substances were sent to the Chemistry Department for analysis and were confirmed to contain in total 2,556.4g of methamphetamine.

Criminal Appeal No 05–193–08 of 2017 (W) ('the second appeal')

[9] The charge against the appellant in the second appeal ('the second appellant') was as follows:

> Bahawa kamu pada 1 Julai 2014 jam lebih kurang 8.30 malam di bilik nombor 919, Arena Star Luxury Hotel, Jalan Hang Lekiu, di dalam Wilayah Persekutuan Kuala Lumpur telah didapati mengedar dadah merbahaya iaitu Cocaine seberat 693.4g dan dengan itu telah melakukan kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Merbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[10] The second appellant, a Thai national, travelled by flight from Bangkok to Bahrain on 26 June 2014, and thereafter from Bahrain to Kuala Lumpur via Abu Dhabi on 29 June 2014 on Etihad Airways. At the Bahrain airport, the second appellant checked in a bag (exh P34) for her flight to Kuala Lumpur. On 30 June 2014, upon her arrival at Kuala Lumpur International Airport ('KLIA'), the second appellant lodged a complaint regarding the loss of the bag to the airport authorities. The second appellant gave her personal information and the address where she would be staying, which was Room 919 in Hotel Arena Star Luxury, Kuala Lumpur.

[11] On 1 July 2014, the bag arrived at KLIA and was handed over to the lost and found section of Malaysia Airlines System ('MAS'). Etihad Airways had requested MAS to arrange the delivery of the bag to the second appellant. The bag had been labelled with a 'rush' tag ('P28'), indicating the second appellant's name and the tag number.

[12] At about 4pm on the same day, an employee of bags handling company ('SP8') brought the bag from the lost and found section to the arrival hall for scanning. During the scanning process, a customs officer ('SP4') noticed a suspicious green image on the inside walls of the bag. He contacted the KLIA customs enforcement team. SP10 led the enforcement team to the scanning machine and received the bag from SP4.

[13] Having examined the bag, SP10 noticed the second appellant's name on the tag and noted that the bag was in good condition but unlocked. SP10 requested SP8 to deliver the bag to the second appellant as planned. SP10 and some other customs officers followed SP8 to Hotel Arena Star Luxury in a different vehicle.

[14] At the hotel, SP10 brought the bag to the hotel counter and met a hotel staff SP6, who telephoned the second appellant in Room 919 to collect her bag. The second appellant came down to the hotel lobby, signed the receipt, and took the bag from SP8. The second appellant then pulled the bag into the elevator, while being followed by SP10 and three other officers. In the elevator, SP10 saw the second appellant tore off the tag from the bag.

[15] When the elevator reached the ninth floor, the second appellant exited and went to Room 919. As she was about to open the room door, SP10 introduced himself. SP10 had also obtained the bag tag which was earlier on torn off by the second appellant. The second appellant's reaction was one of shock.

[16] In Room 919, SP10 instructed the second appellant to open the bag for examination. After the second appellant unzipped the bag and removed the items therein, SP10 found a black layer on the inside wall of the bag. SP10 requested the second appellant to cut the layer with a knife, and found white powder inside the black layer.

[17] The second appellant and the bag were taken to the KLIA customs enforcement office where SP10 made further inspections of the bag and discovered a black frame. Around the black frame were found two packages containing white powder. The white powder was sent to the Chemistry Department for analysis. After analysis the white powder was confirmed to contain 693.4g of cocaine.

DECISIONS OF THE HIGH COURT

The first appeal

[18] The learned trial judge in respect of this first appeal ruled that for the element of possession the presumption under sub-s 37(d) of the DDA could be invoked against the first appellant. The learned trial judge found that the bag was under the custody and control of the first appellant. Such finding was premised on the evidence that the tag was attached to the bag and the first appellant was caught red-handed carrying the bag.

[19] The learned trial judge also found that there was evidence to indicate the knowledge of first appellant. Such finding was based on how the drugs were carefully and cunningly concealed in the inner layers of the handbags, packed as if they were new and placed together with other items similarly packed. The learned trial judge therefore inferred an intention to avoid detection and

thereby knowledge. Indeed the learned trial judge concluded that the only logical finding would be that the first appellant had knowledge of the drugs she was carrying in the bag.

[20] On the issue of trafficking, the learned trial judge ruled that in view of s 37A the prosecution was allowed to invoke another presumption under sub-s 37(da)(xvi) as the weight of the methamphetamine exceeded 50g. The trial judge found that the prosecution had proven the following overt acts:

(a) that the first appellant was conscious in the carrying or transporting of the drugs from Hong Kong to Malaysia by flight; and

(b) that the concealment of the drugs was solely for the purpose of evading detection.

[21] The learned trial judge therefore found a prima facie case made against the first appellant.

[22] In her defence the first appellant said that while on holiday in Thailand with her friend Jackelyn, she was offered an assignment from Jackelyn's boyfriend, Kevin, to carry diamonds from Hong Kong to Malaysia. It was the first appellant's account that the next day she flew to Hong Kong alone. On arrival in Hong Kong she was picked up by one Mike who on the following day brought her to the Hong Kong airport and checked in the bag for her.

[23] The learned trial judge did not accept the defence of innocent carrier advanced by the first appellant. The learned trial judge reasoned that no one would carry diamonds of colossal value in an unlocked checked-in bag. They could have been stolen while in transit. It was also inferred that from the conduct of the first appellant the transaction was planned and well-executed based on the frantic and fast-paced action taken. Meanwhile, the account given by the first appellant in court was also ruled to be an afterthought in order to dissociate herself from the knowledge of the drugs.

[24] The learned trial judge also held that there were circumstances which could have aroused the suspicion of the first appellant on what she was carrying in the bag. Yet, she just ignored those facts indifferent to what she was carrying and simply shut her eyes on the obvious. Applying therefore the principle of wilful blindness the first appellant was taken to know that she was carrying drugs. Hence, the first appellant was convicted as charged and sentenced to death.

The second appeal

[25] The High Court observed that s 37A of the DDA would allow the use

of double presumptions, namely, the presumptions under sub-s 37(d) and (da) could be used together to prove 'possession and knowledge' and thereafter to prove 'trafficking'.

[26] In respect of the presumption under sub-s 37(d), the learned trial judge noted that the prosecution needed only to prove that the second appellant had the custody and control over the bag in order for the second appellant to be presumed to have possession and knowledge of the dangerous drug unless proven otherwise. The learned trial judge found custody and control on the following facts:

(a) that at the time of arrest the second appellant was holding the bag;

(b) that the second appellant removed the bag tag while still in the elevator;

(c) that the second appellant's name was shown on the bag tag and the passenger information document;

(d) that the second appellant checked in the bag herself at the Bahrain airport;

(e) that the second appellant made a complaint at KLIA after failing to locate the bag, and provided her hotel details for the bag to be delivered to her immediately upon arrival;

(f) that the second appellant received the bag at the hotel lobby and brought it to the room; and

(g) that the contents of the bag (other than the dangerous drugs) were the second appellant's personal effects, such as clothings.

[27] The learned trial judge took into account the fact that the bag was reported missing and the possibility of having been tampered with since the bag was unlocked. However, based on the evidence as a whole, it was found that the fact that the bag was not with the second appellant for a day did not negate the custody and control on her part. It was highlighted that the drugs were not easily found when the bag was opened. On the contrary, the drugs were hidden in a secret compartment in the bag, namely, within the black frame which was only found when the side of the bag was cut with a knife. The learned trial judge considered that it was not possible within a short time for any other persons to have prepared such a frame to fit the size of the bag and for two packages to fit the size of the frame.

[28] Since the elements of custody and control were proven, it was ruled that sub-s 37(d) applied and the second appellant was presumed to have possession and knowledge of the drugs. Further, since the weight of the cocaine exceeded the statutory stipulated weight, it was then ruled that sub-s 37(da)(ix) also applied. As such the second appellant was presumed to be trafficking the drugs.

[29] Having found that a prima facie case had been established by the prosecution, the learned trial judge called for the first appellant to enter defence. The basis of the second appellant's defence case was that she had no knowledge of the drugs in the bag. The learned trial judge however pointed out the inconsistencies in the second appellant's defence case, including:

(a) that it was the second appellant's case that she went to Bahrain for holiday yet it was inconsistent with her testimony during cross-examination that she went there to find work;

(b) that the second appellant could not recall the hotel or the name of the beach she purportedly visited in Bahrain;

(c) that the second appellant had stopped working as a bartender, where she had previously earned a monthly salary of RM700. It was difficult to accept that the second appellant, who has a six year old child, could afford the high cost for the alleged holiday; and

(d) that the second appellant's account that the money for her holiday in Bahrain was given by a friend, Som, from her previous workplace, was doubtful. Som was not called to give evidence.

[30] The learned trial judge rejected the second appellant's defence as a bare denial and held that the second appellant had failed to adduce evidence to rebut the presumptions under sub-s 37(d) and (da) of the DDA. Accordingly, the learned trial judge found the second appellant guilty as charged and sentenced her to death.

DECISION OF THE COURT OF APPEAL

[31] Aggrieved, both the appellants appealed respectively to the Court of Appeal against the decisions handed to them by the respective learned trial judges.

The first appeal

[32] The first appellant appealed on three grounds, namely, on the admissibility of witness statements, the constitutionality on the use of double presumptions and the defence of innocent carrier.

[33] In respect of admissibility of witness statements, the Court of Appeal held that there was no statutory requirement for written consent to be given in order to admit written statements from the prosecution witnesses. More so when counsel for the first appellant did not object to the use of the written statements during the trial. No miscarriage of justice or prejudice to the first appellant was found to have been caused.

[34] On the issue of double presumptions, the Court of Appeal noted that it was not in dispute that the Amending Act inserting s 37A into the DDA was a valid Act enacted by Parliament. Further, it was considered that despite the invocation of the presumptions, the onus of proving the case beyond reasonable doubt still rests on the prosecution. At any rate before a presumption can be invoked, the prosecution must adduce positive evidence of the relevant fact or facts. As such the rights of the defence are maintained since the opportunity to rebut the presumption is not taken away. Hence, the Court of Appeal held that the use of double presumptions was not unconstitutional and did not violate the presumption of innocence.

[35] On the defence of innocent carrier, the Court of Appeal agreed with the finding and conclusion of the learned trial judge. It was held that it was not enough for the first appellant to merely assert the absence of knowledge. If and when the circumstances arouse suspicion, the Court of Appeal opined that it was incumbent upon the first appellant to make the necessary inquiries. Accordingly the appeal of the first appellant was dismissed.

The second appeal

[36] The second appellant appealed on the ground that the learned trial judge had erred in law and fact in finding custody and control.

[37] However, the Court of Appeal held that while no drugs might have been detected when the bag was checked in at Bahrain airport, it did not mean that no drugs were present in the bag at that time. The Court of Appeal noted that there were many such instances of such happening. But it is not for the court to answer such question as to how the drugs escaped detection at the airport of origin.

[38] On the possibility of tampering the Court of Appeal agreed with the finding of the learned trial judge that considering the manner in which the drugs were concealed inside the bag, it would not have been possible for others to have placed the drugs in the bag in that manner within the time period. There was also no evidence found to indicate others including any potential enemy, motivated to harm the second appellant by planting the drugs in the bag. Anyway, the Court of Appeal considered that a person with such a motive would not have gone to such extent of modifying the bag to conceal the drugs. Such person or enemy would have placed the drugs in a conspicuous place.

[39] The Court of Appeal also observed that as the drugs were well concealed, leaving the bag unlocked was just an excuse to say that someone could have placed the drugs inside the bag in the event of the second appellant being caught. Further, since the second appellant had checked the bag and

confirmed that it was in good condition upon receiving it at the hotel lobby, the Court of Appeal ruled out tampering as an issue. A

[40] The Court of Appeal also agreed with the learned trial judge on the lack of credibility to the story that the second appellant travelled to Bahrain for holiday using funds supplied by Som. Indeed the Court of Appeal found the defence of second appellant was a bare denial. It was incapable of casting a reasonable doubt in the prosecution's case or rebutting the presumption of knowledge on the balance of probabilities. The appeal was therefore dismissed. B

DECISION OF THIS COURT C

[41] We are very conscious that there are several grounds of appeal submitted for both these appeals. However, before us learned counsel for both the appellants focused his submissions solely on the constitutionality of s 37A of the DDA. The section appears to allow the use of double presumptions to find possession as well as trafficking for a charge under s 39B. D

[42] Thus, in this judgment we will therefore mainly deal with the impugned section. In the event we find there is no merit on the constitutionality challenge we will then, if necessary, proceed with the other grounds submitted before making our ultimate decisions on the respective appeals. E

History of s 37A of the DDA F

[43] Section 37 of the DDA lists out a number of presumptions. The two presumptions that were invoked in the present appeals are in sub-s (d) and (da), which are reproduced below for ease of reference: G

> 37 *Presumptions*
>
> In all proceedings under this Act or any regulation made thereunder —
>
> ...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug; ... H
>
> ...
>
> (da) any person who is found in possession of — I
>
> ...
>
> (ix) 40 grammes or more in weight of cocaine;
>
> ...

A (xvi) 50 grammes or more in weight of Methamphetamine; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; ...

B **[44]** Prior to the insertion of s 37A, in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, the accused was convicted for drug trafficking under s 39B of the DDA. The trial judge found that the accused had failed to rebut the statutory presumptions in sub-ss 37(d) and (da) of the DDA on a balance of probabilities.

C **[45]** The Federal Court drew attention to the distinction between the words 'deemed' in sub-s 37(d) and 'found' in sub-s 37(da). The former arises by operation of law without necessity to prove how a particular state of affairs is arrived at, whereas the latter connotes a finding made by a court after trial. It
D was held that, in order to invoke the presumption of trafficking under s 37(da), the court must make an express affirmative finding that the accused was 'in possession' of the drug based on evidence. Based on the clear and unequivocal wording of the two subsections, the presumption of possession under sub-s 37(d) cannot be used to invoke the presumption of trafficking under
E sub-s 37(da). His Lordship Chong Siew Fai (CJ (Sabah and Sarawak)) said this at p 289:

> In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to
F be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

[46] The Federal Court also went on to express the view that the use of presumption upon presumption would be harsh and oppressive. The court said
G this at p 291:

> In our view, on the wording of s 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the
H phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused.

[47] Following the decision in *Muhammed bin Hassan*, Parliament tabled the
I Dangerous Drugs (Amendment) Act 2014, which introduced a new s 37A without any amendment to any of the wordings in the presumption provisions. The legislative purpose in enacting s 37A is to permit the presumption in sub-s 37(d) to be applied together with the presumption in sub-s 37(da) against an accused. It was explained at the second reading of the Bill in the Dewan

Rakyat (House of Representatives) (per the *Hansard* of 4 December 2013) in this way:

> Sebelum ini pihak pendakwaan dengan jayanya menggunakan kedua-dua anggapan ini bagi membuktikan kes pengedaran di bawah seksyen 39B Akta 234 yang jika sabit kesalahan membawa hukuman gantung mandatori. Walau bagaimanapun sejak keputusan kes Mahkamah Persekutuan iaitu Pendakwa Raya versus Mohamad Hassan 1998 (2) CLJ 170, pendakwaan tidak lagi boleh menggunakan kedua-dua anggapan ini bersekali. Ini telah menyebabkan kegagalan pihak pendakwaan membuktikan pengedaran seperti mana yang ditakrifkan di bawah seksyen 2 Akta 234. Oleh yang demikian bagi mengatasi masalah ini, maka Kementerian Kesihatan mencadangkan peruntukan baru ini dimasukkan ke dalam Akta 234.
>
> Tuan Yang Di-Pertua, cadangan peruntukan menomborkan semula seksyen 37A sebagai seksyen 37B dan memasukkan seksyen 37A yang baru adalah bertujuan untuk memperjelaskan pemakaian seksyen 37(d) dan 37(da) Akta Dadah Berbahaya 1992. Pindaan ini diperlukan ekoran daripada beberapa keputusan mahkamah yang diputuskan termasuk keputusan Mahkamah Persekutuan di dalam kes Mohamad Hassan versus Pendakwa Raya 1998 (2) CLJ 170.

[48] The purpose of the amendment was therefore obvious, namely, to overcome the impact of the decision in *Muhammed bin Hassan*. The amendment Act was duly passed and the newly inserted s 37A came into force on 15 February 2014, before the dates on which the appellants in these appeals were charged. Section 37A reads:

> 37A *Application of presumptions*
>
> Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[49] The appellants now seek to challenge the constitutionality of s 37A on two broad grounds:

(a) that it contravenes the principle of separation of powers in the FC; and

(b) that it violates arts 5 and 8 of the FC.

[50] But before we deal with these two grounds in turn, we propose to first consider the preliminary objection raised by the respondent.

PRELIMINARY OBJECTION

The submissions of parties

[51] At the commencement of the hearing of these appeals, the learned deputy public prosecutor for the respondent raised the issue that the appellants

had not obtained leave from the Federal Court to challenge the constitutional validity of s 37A of the DDA. It was pointed out that the validity of the section was challenged on the ground that Parliament did not have power to enact it under art 74(1) of the FC. It was submitted that pursuant to art 4(4) of the FC the appellants ought to have sought leave from the Federal Court to mount the present challenge.

[52] In response, learned counsel for the appellants submitted that the appellants were not challenging the legislative competence of Parliament to enact s 37A. The crux of the appellants' argument was that, reading art 121(1) together with art 74(1), Parliament was empowered to make law and not to declare law. It was the appellants' case that the enactment of s 37A was an impermissible act of declaring law. As such, it was contended that the present challenge did not fall within art 4(4) and that leave was not required.

Scope of art 4(4) of the FC

[53] Article 4(3) of the FC reads as follows:

> The validity of any law made by Parliament or the Legislature of any State shall not be questioned *on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws*, except in proceedings for a declaration that the law is invalid on that ground or —
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State. (Emphasis added.)

[54] Article 4(4) which relates to the ground mentioned in art 4(3) provides that:

> *Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court*; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause. (Emphasis added)

[55] Thus, art 4(4) applies only where the validity of a law is challenged on the ground that it makes provision with respect to a matter on which Parliament or the State Legislature has no power to make laws. The central question relates to the subject matter of the impugned law. In *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 at para 32, this court has clarified that the ground of

challenge referred to in arts 4(3) and 4(4) comprises the following situations: A

> ... an impugned law deals with a matter with respect to which the relevant legislative body has no power to make law if:
>
> (a) Parliament made law on a matter not within the Federal List;
>
> (b) the State Legislature made law on a matter not within the State List; B
>
> (c) Parliament made law on a matter within the State List pursuant to art 76, but failed to comply with the requirements in the said Article; or
>
> (d) the State Legislature made law on a matter within the Federal List pursuant to art 76A(1), but failed to comply with the requirements in the said Article ... C

[56] Leave from the Federal Court is only required in proceedings for a declaration that a law is invalid on that specific ground. In such proceedings, the Federal Court has exclusive original jurisdiction to determine the matter (see: art 128(1)(a)). D

[57] There are of course other grounds on which the validity of a law may be challenged. For instance, a law may be invalid because it is inconsistent with certain provisions in the FC (art 4(1)), or a State law may be invalid because it is inconsistent with a Federal law (art 75). The court's power to declare a law invalid on any of these other grounds 'is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by government or by an individual' (see *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113). E F

[58] A broader reading of art 4(4), however, was adopted in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765. In that case, the validity of provisions in various State Enactments seeking to control and restrict the propagation of non-Islamic religious doctrines and beliefs among Muslims was challenged in the High Court on the ground that they contravened art 11 of the FC. The Federal Court held that such a challenge fell within the scope of art 4(3) and (4) of the FC and ought not to have been entertained by the High Court. G H

[59] The decision in *Titular Roman Catholic Archbishop of Kuala Lumpur* was followed in *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736, where the validity of a State enactment was challenged on the ground that it offended the fundamental liberties in arts 5, 8, 9 and 10 of the FC. Similarly, the Federal Court held that the challenge could only be made via the specific procedure provided for under arts 4(3) and (4) of the FC. I

[60] These two cases suggest that a challenge to the constitutionality or validity of a law on any ground comes within the ambit of arts 4(3) and (4). With respect, we are of the view that the wide interpretation adopted is contrary to the clear wordings of the aforesaid articles and is not supported by any consistent line of authorities (see: *Ah Thian*, *Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262, *Yeoh Tat Thong v Government of Malaysia & Anor* [1973] 2 MLJ 86, *Syarikat Banita Sdn Bhd v Government of State of Sabah* [1977] 2 MLJ 217, *Rethana v Government of Malaysia* [1984] 2 MLJ 52, *East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia* [1980] 2 MLJ 143). We are therefore not inclined to follow these two cases. In our view they were decided per incuriam. Indeed the anomaly in these two cases appears to have been acknowledged in *Gin Poh Holdings* when this court said this at para 33:

> A different construction of the scope of arts 4(4) and 128(1)(a) appears to have been adopted in a handful of cases. The ground of challenge that a law relates to 'matters with respect to which the legislative body has no power to make laws' was given a wider interpretation, extending to challenges that an Act contravenes the fundamental liberties provisions in the Federal Constitution and that a State Enactment is inconsistent with Federal law. We observe that the cases in favour of the wider interpretation do not offer a clear juridical foundation for the alternative construction, and are not altogether reconcilable with the dominant position settled by the line of authorities discussed earlier.

[61] In the present appeals, as readily conceded by learned counsel for the appellants, the legislative competence of Parliament in respect of the subject matter of s 37A of the DDA is not in issue. The basis of the appellants' challenge is that by enacting s 37A which reverses the decision of the Federal Court in *Muhammad bin Hassan*, Parliament had usurped the judicial power of the Federation and fallen foul of art 121(1) of the FC. The appellants' reference to art 74(1) was merely to draw attention to the words 'Parliament may *make* law' in support of that basis. Since the validity of s 37A is not challenged on the ground that it relates to a matter on which Parliament has no power to make laws, the challenge does not fall within the scope of art 4(4) and leave is not required from this court.

[62] Hence, we find the preliminary objection by the respondent has no merit and we dismiss it accordingly.

CHALLENGE BASED ON SEPARATION OF POWERS

The submissions of parties

[63] The appellants' main ground for challenging the validity of s 37A is based on the principle of separation of powers. The submissions for the appellants on this point may be summarised as follows:

(a) under art 74(1) of the FC, Parliament is empowered only to make laws; A

(b) under art 121(1), judicial power is vested exclusively in the courts;

(c) in *Muhammed bin Hassan's* case the Federal Court declared that using the presumption of possession to invoke the presumption of trafficking under s 37 of the DDA was harsh, oppressive and thus impermissible; B

(d) that once the Federal Court had exercised judicial power on the matter, Parliament could not interfere with the exercise by amending the DDA to legalise what had been declared illegal; and

(e) that by enacting s 37A to overrule the decision of *Muhammed bin Hassan*, Parliament had exercised the judicial power of declaring law. C

[64] In response the respondent submitted:

(a) that s 37A was validly enacted by Parliament in accordance with its legislative powers under art 74(1) of the FC read with items 3 and 4 in the Federal List; D

(b) that in *Muhammad bin Hassan*, the Federal Court held that sub-ss 37(d) and (da) of the DDA should only be construed to permit the automatic application of a presumption with another presumption if the intention of Parliament was clear from the wordings of the statute; E

(c) that the purpose of enacting s 37A was in fact to bring the DDA in line with the decision in *Muhammad bin Hassan*, so as to allow the application of double presumptions; F

(d) that s 37A is not mandatory in nature but gives the court a discretion to apply any presumption in addition to or in conjunction with any other presumptions; and

(e) that s 37A does not encroach upon the judicial power of the courts. G

Separation of powers in the FC

[65] The ground of challenge raised calls for a proper understanding of the principle of separation of powers in our FC and the respective roles of Parliament and the courts. H

[66] It is well-established that 'a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles' (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 at para 29). It is not to be interpreted in a vacuum without regard to the thinking in other countries sharing similar values (see *The State v Khoyratty* [2006] UKPC 13 at para 29). The importance of the underlying values of a constitution was noted by the I

Judicial Committee of the Privy Council in *Matadeen v Pointu* [1998] UKPC 9 with these words:

> ... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.

[67] It should also be duly considered that constitutions based on the Westminster model are founded on the underlying principle of separation of powers with which the drafters are undoubtedly familiar. Thus, even on an independent reading of the FC, unaided by any such knowledge, the provisions therein cannot but suggest the intention to confine the exercise of legislative, executive and judicial power with the respective branches of government (see *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1932] ALR 22). The separation of powers between the three branches of government is a logical inference from the arrangement of the FC itself, the words in which the powers are vested and the careful and elaborate provisions defining the repositories of the respective powers. As such 'this cannot all be treated as meaningless and of no legal consequence' (see *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] ALR 163).

[68] Hence, while the FC does not expressly delineate the separation of powers, the principle is taken for granted as a constitutional fundamental. The absence of express words in the FC prohibiting the exercise of a particular power by a different branch of government does not by any means imply that it is permitted. Lord Diplock in *Hinds v The Queen* [1977] AC 195 articulated it well when he said this at p 212:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. *Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.* (Emphasis added.)

(See also *Liyanage v The Queen* [1967] 1 AC 259 at p 287).

[69] The separation of powers between the Legislature, the Executive, and the Judiciary is a hallmark of a modern democratic State.

(See *The State v Khoyratty* at para 29; *DPP v Mollison (No 2)* [2003] UKPC 6 at para 13; *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at para 50). Lord Steyn in *The State v Khoyratty* at para 12 succinctly said this:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

[70] Thus, the separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands (see: James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, The Federalist Papers No 51 (1788)).

[71] Between the three branches of government, 'all the parts of it form a mutual check upon each other. The three parts, each part regulates and is regulated by the rest' (see *Blackstone, Commentaries* (Vol 1), 1765/1979 at p 154). The separation of powers provides a brake to the exercise of government power; the institutions are designed 'not only to co-operate but to conflict, as part of the pulley of checks and balances' (see L Thio, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at p 160).

[72] This court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the FC (see *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 at para 90, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 at paras 48 and 90).

[73] In fact courts can prevent Parliament from destroying the 'basic structure' of the FC (see *Sivarasa Rasiah* at para 20). And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation.

[74] The role of the judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide. As rightly stated by Professor Sir William Wade (quoted by this court in *Indira Gandhi* at para 41):

> ... it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts.

Legislative power

[75] It is against the background of these fundamental principles that the appellants' challenge falls to be considered. The appellants rely on three Indian authorities in support of the contention that Parliament may make law, but may not declare law so as to overrule a decision of the court (see *ST Sadiq v State Of Kerala* [2015] 4 SCC 400, *Indira Nehru Gandhi v Shri Raj Narain* [1975] 2 SCC 159, and *Medical Council of India v State of Kerala* (Writ Petition (C) No 178 & 231 of 2018)). The facts and decisions in these cases will be examined in turn.

[76] In *ST Sadiq v State of Kerala*, the state government issued notices to and acquired ten cashew factories pursuant to the Kerala Cashew Factories (Acquisition) Act 1974. The ten factories challenged the acquisition in court. The Indian Supreme Court held that the notice issued was not in compliance with the statutory requirements and ordered the state government to hand the factories back to the respective owners. The state government then enacted the Kerala Cashew Factories Acquisition (Amendment) Act 1995. Section 6 of the Amendment Act which declared that the factories specified in the schedule shall vest in the government with effect from the date stated, notwithstanding any judgment or order of court, and notwithstanding any other law. The schedule contained only the ten cashew factories.

[77] The Indian Supreme Court held that s 6 was unconstitutional in directly seeking to upset a final judgment of the court. Nariman J said this at para 13:

> It is settled law by a catena of decisions of this Court that the legislature cannot directly annul a judgment of a court. The legislative function consists in 'making' law [see: Article 245 of the Constitution] and not in 'declaring' what the law shall be (see Article 141 of the Constitution) ... *It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court,* and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then legislation which trenches upon the

judicial power must necessarily be declared to be unconstitutional. (Emphasis added.)

[78] In *Indira Nehru Gandhi v Shri Raj Narain*, the election of the appellant, the then Prime Minister, had been declared void by the High Court on grounds of electoral malpractice. The Constitution (Thirty-Ninth Amendment) Act 1975 was then enacted, purporting to insert art 329A in the Constitution. Clause 4 of the said article provided that, among others: no law made by Parliament prior to the Amendment Act in respect of elections shall apply to a person who held the office of Prime Minister at the time of the election; the election of such a person shall not be void on any ground under those laws; notwithstanding any order of court declaring such election to be void, the election shall continue to be valid; and any such order and any finding on which such order is based shall be void and of no effect.

[79] The Indian Supreme Court held that cl 4 of the Amendment Act was invalid. Its vice was in conferring an absolute validity upon the election of one particular candidate and prescribing that the validity of that election could not be questioned before any forum or under any law.

[80] Ray CJ explained at para 190:

> A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that *a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding* ... (Emphasis added.)

[81] In the recent case of *Medical Council of India v State of Kerala*, the admission of about 150 students to some medical colleges during the academic year 2016–17 were found to be illegal by the High Court. The decision was upheld by the Indian Supreme Court. Subsequently, the state government promulgated the Kerala Professional Colleges (Regularisation of Admission in Medical Colleges) Ordinance 2017 to regularise the admissions of those students. The Ordinance provided that, notwithstanding any judgment, order, or any proceedings of any court, it would be lawful for the government to regularise the admission of those candidates for the academic year 2016–17 whose admission was earlier on cancelled by the court.

[82] The Indian Supreme Court held that the Legislature could not declare any decision of a court of law to be void or of no effect. However, it may remove

A the defects in the existing law pointed out by the court. On the facts, the case was not one of removing a defect in the law. The state government sought to get rid of the illegalities in the admissions without changing the provision of the existing law.

B **[83]** The ordinance was found to be invalid, being an act of nullifying a judgment of the court which tantamount to violating the exclusive vesting of judicial powers in the judiciary. Arun Mishra J explained at para 33:

> C It is crystal clear in the instant case that the State Government has exceeded its powers and has entrenched upon the field reserved for the judiciary. It could not have nullified the judgment ... The provision of any existing law framed by legislation has not been changed by the State Government by the impugned Ordinance but illegalities found in the admissions were sought to be got rid of. What was laid down in the judgment for ensuring the fair procedure which was required to be followed was sought to be undone, it was nothing but the wholly D impermissible act of the State Government of sitting over the judgment and it could not have promulgated the Ordinance setting at naught the effect of the judgment.

[84] Read in context, the three cases above do not stand for the proposition E that any amendment to a law which has been interpreted by a court is an impermissible encroachment into judicial power. On the contrary, the cases clearly recognise the power of the Legislature to amend a law which formed the basis of the decision of the court. The effect of such an amendment is not to overrule the decision of the court in that case, but to alter the legal foundation F on which the judgment is founded. The earlier decision of the court then becomes unenforceable for the interpretation of the newly amended law. But the decision itself which led to the amendment is not affected.

G **[85]** In fact, there are plethora of decisions by the Indian Supreme Court postulating a principle to the effect that while a legislature does not have the power to render ineffective a judgment of a court, it may amend the law to alter the legal basis upon which the judgment was founded (see for instance *Janapada Sabha Chhindwara v The Central Provinces Syndicate Ltd* [1970] 1 SCC 509 at para 10; *State of Haryana v Karnal Co-Op Farmers's Society Ltd* H [1993] 2 SCC 363 at para 37, *SR Bhagwat v State of Mysore* [1995] 6 SCC 16 at para 18). The same principle was succinctly elucidated by the Indian Supreme Court in the case of *Cauvery Water Disputes Tribunal* [1993] Supp 1 SCC 96 (II) at para 76):

> I The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.

[86] The distinction between amending a law to remove its defects and overruling a decision of the court was explained in *Cheviti Venkanna Yadav v State of Telangana* [2017] 1 SCC 283:

> This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court can have a curative and neutralizing effect. *When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling by the legislature.* In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. (Emphasis added.)

[87] On a careful reading of the three Indian authorities relied upon by learned counsel for the appellants, we are of the view that those cases do not render any assistance to the appellants' broad proposition. The common striking feature of those cases cited is that the impugned laws had the direct effect of overruling the outcome of the respective particular decisions by the courts. Hence, these Indian cases are readily distinguishable from the facts of the present appeals.

[88] In fact as indicated earlier on s 37A does not purport to overrule the decision of the Federal Court in *Muhammad bin Hassan*. The finality of the decision in that case in respect of the rights and liabilities of the parties is unaffected. The effect of inserting s 37A is to alter generally the law upon which that decision was based. As such premised on the principles of law distilled from the other cases which differed for the three cases cited by learned counsel for the appellants such an amendment is a permissible exercise of legislative power and does not encroach into the realm of judicial power.

[89] Thus, we agree with the learned deputy public prosecutor's submission for the respondent, that in inserting s 37A, Parliament was not overruling the decision in *Muhammed bin Hassan* but only complying with the opinion of the Federal Court therein which stated that presumption upon presumption could only be permitted if, 'upon the wordings of the two subsections, such an intention of the Parliament is clear'.

[90] With respect, the broad proposition contended by learned counsel for the appellants would have the effect of insulating a law from any change by Parliament once it has been interpreted by the court. Taken to its logical end, in effect, the appellants' argument would mean Parliament is prohibited not only from correcting defects in the law pointed out by the court, but from amending the law for the future once it has been applied by the court. Such a far-reaching impact would undoubtedly constitute a significant fetter on the legislative

power of Parliament not intended by the framers of the FC. It would upset the delicate check and balance mechanism integral to a constitutional system based on the separation of powers.

[91] As the bulwark of the FC and the rule of law, it is the duty of the courts to protect the FC from being undermined by the whittling jealously ensure that the powers of the legislature and executive are kept within their intended limits (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 at paras 33–34; *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 at para 91; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148).

[92] Indeed, barring questions on constitutionality, the role of the courts is generally to apply and interpret the law as laid down by Parliament. It is not for the courts to refuse to apply a new law *solely* on the ground that a court had previously expressed a particular view on the unamended version of the law.

[93] For the reasons above, we dismiss the first ground of challenge raised by the appellants.

CHALLENGE BASED ON ARTS 5 AND 8

The submissions of parties

[94] The second ground of challenge raised by the appellants is based on arts 5 and 8 of the FC. Learned counsel for the appellants submitted that:

(a) art 5(1) includes the right to a fair trial, which encompasses both procedural and substantive fairness;

(b) for all intents and purposes, s 37A of the DDA has the effect of reversing the burden onto an accused to prove his or her innocence;

(c) where double presumptions are applied, it has been held in *Muhammed bin Hassan* that the burden on the appellants to rebut both presumptions on the balance of probabilities is oppressive, unduly harsh, and unfair;

(d) s 37A offends the requirement of fairness housed under arts 5 and 8 of the FC;

(e) the right in art 5(1) is absolute and cannot be derogated;

(f) the doctrine of proportionality does not form part of the common law of England. It arose from the jurisprudence of the European Court of Human Rights; and

(g) the Federal Court in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 had erred in holding that the right to a fair trial and the presumption of innocence under art 5 may be qualified by reference to the principle of proportionality.

[95] In response the learned deputy public prosecutor for the respondent submitted that:

(a) the right to a fair trial is implied in art 5(1) of the FC;

(b) there are exceptions to the general rule that the accused bears no onus of proof, for there are limits to what the prosecution can reasonably be expected to prove in certain situations;

(c) there is no prohibition on presumptions in principle, provided such presumptions satisfy the test of proportionality (see *Gan Boon Aun* and *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64);

(d) even where double presumptions are invoked under s 37A of the DDA, pursuant to s 182A(1) of the Criminal Procedure Code the duty remains on the prosecution to prove its case beyond a reasonable doubt based on all adduced and admissible evidence;

(e) the imposition of presumptions rebuttable by an accused on a balance of probabilities strikes a balance between the public interest in curbing crime and the protection of fundamental rights; and

(f) s 37A of the DDA, being of general application to all persons under like circumstances, does not offend the right to equality under art 8 of the FC.

Article 5: '... in accordance with law'

[96] We begin by acknowledging that in interpreting any constitutional provision such as arts 5 and 8 of the FC, certain principles must be borne in mind:

(a) firstly, it is trite that a constitution is sui generis, governed by interpretive principles of its own;

(b) secondly, in the forefront of these interpretive principles is the principle that its constitutional provisions should be interpreted generously and liberally, not rigidly or pedantically (see *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29); and

(c) thirdly, it is the duty of the courts to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the FC, in order to reveal the spectrum of constituent rights submerged in each

A article (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at para 8).

[97] Article 5(1) of the FC reads:

B > No person shall be deprived of his life or personal liberty save in accordance with law.

[98] In our view art 5(1) is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Deprived a C person of his right under art 5(1) the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained. In fact deprivation of personal liberty impacts on every other aspect of human freedom and dignity (see *Maneka Gandhi v Union of India* [1978] AIR 597). But at the same time art 5(1) is not all-encompassing and each right protected D in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts.

E

[99] The importance of the right to life under art 5 cannot be over-emphasised. In relation to the rights to life and dignity the South African Constitutional Court in *State v Makwanyane* [1995] 1 LRC 269 at para 84 states:

F > Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease.

G

[100] Since the right to life is 'the most fundamental of human rights', the basis of any state action which may put this right at risk 'must surely call for the most anxious scrutiny' (per Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at p 531). The courts' role is given added H weight where the right to life is at stake.

[101] 'Law', as defined in art 160(2) of the FC read with s 66 of the Interpretation Acts 1948 and 1967, includes the common law of England. The concept of rule of law forms part of the common law of England. The 'law' in I art 5(1) and in other fundamental liberties provisions in the FC must therefore be in tandem with the concept of rule of law and NOT rule by law (see *Lee Kwan Woh* at para 16; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at para 17). (Emphasis added.)

[102] It has been remarked that the phrase 'rule of law' has become meaningless thanks to ideological abuse and general over-use (see *H Barnett, Constitutional and Administrative Law*, (2nd Ed) (London: Cavendish Publishing, 1998) at p 90). Different models of the rule of law have been adopted in different jurisdictions (see VV Ramraj , *'Four Models of Due Process'* in OUP and New York University School of Law 2004, I.CON Vol 2, No 3 at pp 492–524). It is perhaps opportune and necessary for us to outline what is generally meant by the rule of law.

[103] A central tenet of the rule of law is the equal subjection of all persons to the ordinary law (see *AV Dicey, An Introduction to the Study of the Law of the Constitution, 10th Ed (London: Macmillan, 1959*) at p 202). People should be ruled by the law and be able to be guided by it. Thus, the law must be capable of being obeyed.

[104] 'Law' must therefore satisfy certain basic requirements, namely:

(a) it should be clear;

(b) sufficiently stable;

(c) generally prospective;

(d) of general application;

(e) administered by an independent judiciary; and

(f) the principles of natural justice and the right to a fair trial are observed.

[105] These requirements of 'law' in a system based on the rule of law are by no means exhaustive. While the precise procedural and substantive content of the rule of law remains the subject of much academic debate, there is a broad acceptance of the principles above as the minimum requirements of the rule of law (see J Raz, *The Rule of Law and its Virtue* (1977) 93 LQR 195; L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); T Bingham, *The Rule of Law* (London: Penguin Books, 2011)).

[106] It is therefore clear that the 'law' in the proviso 'save in accordance with law' does not mean just any law validly enacted by Parliament. It does not authorise Parliament to enact any legislation under art 5(1) contrary to the rule of law. While the phrase 'in accordance with law' requires specific and explicit law that provides for the deprivation of life or personal liberty (see *In Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372 at p 378), nevertheless such law must also be one that is fair and just and not merely any enacted law however arbitrary, unfair, or unjust it may be. Otherwise that would be rule by law.

[107] The 'law' thereof also refers to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England. And to be relevant in this country such common law must be in operation at the commencement of the FC. Further, any system of law worthy of being called just must be founded on fundamental values. 'The law must be related to the ... fundamental assessments of human values and the purposes of society' (per Viscount Simonds, *Shaw v Director of Public Prosecutions* [1962] AC 220 at p 268). As persuasively argued by Lord Bingham, the rule of law requires that fundamental rights be protected, (see Bingham, *The Rule of Law* (London: Penguin Books, 2011 at pp 66–68). It is also taken for granted that the 'law' alluded to would not flout those fundamental rules. As Lord Diplock stated in no weak terms, to hold otherwise would render the purported entrenchment of fundamental liberties provisions in the FC 'little better than a mockery' (see *Ong Ah Chuan* at p 670).

[108] We pause at this juncture to note that s 37A of the DDA begins with the phrase 'notwithstanding any written law or rule of law'. For the avoidance of doubt, the words 'rule of law' in s 37A refer to implied ancillary rules, such as the rules of procedure or evidence (see FAR Bennion, *Statutory Interpretation: A Code* (3rd Ed) (London: Butterworths, 1997) at p 805). It does not purport to exclude the Rule of Law as a legal concept. If it were to be interpreted otherwise then that would be a rule by law and could not be within the ambit of the term 'law' in art 5(1) of the FC and hence unconstitutional. It must also be emphasised here that the principle of the rule of law, being a constitutional fundamental, cannot be abrogated by mere statutory words.

[109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts (see *Lee Kwan Woh* at para 18).

[110] It has been declared as well by this court that the fundamental principle of presumption of innocence, long recognised at common law, is included in the phrase 'in accordance with law' (see *Gan Boon Aun* at paras 14–15). Indeed the presumption of innocence is a 'hallowed principle lying at the very heart of criminal law', referable and integral to the right to life, liberty, and security (see *R v Oakes* [1986] 1 SCR 103 at para 29). The famous statement of Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at p 481 is regularly quoted as a starting point in affirming the principle:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt *subject to what I have already said as to the defence of insanity and subject also to any statutory exception*

... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. (Emphasis added.)

[111] It is pertinent to note that Viscount Sankey's proviso of 'any statutory exception' was pronounced in the context of a legal system based on Parliamentary sovereignty. Whereas in our jurisdiction a provision of law, although it may be in the form of a proviso, is not rendered constitutionally valid if it 'would subvert the very purpose of the entrenchment of the presumption of innocence' in the FC (see *R v Oakes* at para 39). As such, in determining its constitutionality the substantive effect of a statutory exception must be considered.

[112] Yet at the same time it must also be taken into account that despite the fundamental importance of the presumption of innocence, there are situations where it is clearly sensible and reasonable to allow certain exceptions. For instance, a shift on onus of proof to the defence for certain elements of an offence where such elements may only known to the accused. But it is not to say that in such instance the prosecution is relieved of its burden to establish the guilt of an accused beyond reasonable doubt. In other words, it is widely recognised that the presumption of innocence is subject to implied limitations (see *A-G of Hong Kong v Lee Kwong-Kut* [1993] AC 951 at p 968). A degree of flexibility is therefore required to strike a balance between the public interest and the right of an accused person.

[113] In *State v Coetzee* [1997] 2 LRC 593 the South African Constitutional Court speaking through Sachs J provided clear justification on the need to do the balancing enquiry between safeguarding the constitutional rights of an individual from being 'convicted and subjected to ignominy' and heavy sentence and 'the maintenance of public confidence in the enduring integrity and security of the legal system'. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into scales as part of the justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jerking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relics status as a doughty defender of rights in the most trival of cases'.

[114] Hence, this is where the doctrine of proportionality under art 8(1) becomes engaged.

[115] But before we deal with art 8(1) in relation to the proportionality test it is perhaps apposite to note here that in *Muhammed bin Hassan* this court held that to read the presumption of possession in sub-s 37(d) 'into s 37 (da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but *would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused*.' (Emphasis added.)

[116] Meanwhile, when enacting s 37A Parliament did not find it necessary to amend the wordings of sub-s 37(da) in particular the word 'found' therein. As such the view given by this court on the word 'found' in *Muhammed bin Hassan* is still valid.

Article 8 and the doctrine of proportionality

[117] When interpreting other provisions in the FC the courts must do so in light of the humanising and all-pervading provision of art 8(1) (see *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at para 8, approved in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 at para 86; *Lee Kwan Woh* at para 12). Article 8(1) guarantees fairness in all forms of state action (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261). The essence of the article was aptly summarised in *Lee Kwan Who* at para 12:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[118] In other words, art 8(1) imports the principle of substantive proportionality. 'Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved' (see *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* at para 8. The doctrine of proportionality housed in art 8(1) was lucidly articulated in *Sivarasa Rasiah* at para 30:

> ... all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[119] Accordingly, when any state action is challenged as violating a

fundamental right, such as the right to life or personal liberty under arts 5(1) and 8(1) will at once be engaged such that the action must meet the test of proportionality. This is the point at which arts 5(1) and 8(1) interact (see *Sivarasa Rasiah* at paras 17–19).

[120] This approach is consistent with that adopted in other Commonwealth jurisdictions. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question (see *State v Makwanyane* [1995] 1 LRC 269 at p 316).

[121] The United Kingdom position based on the leading cases of *R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28, and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 was helpfully distilled in *Gan Boon Aun* at para 46 as thus:

(a) presumptions of fact or of law operate in every legal system;

(b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of mens rea;

(c) when a section is silent as to mens rea, there is a presumption that mens rea is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;

(d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;

(e) *there is no prohibition against presumptions in principle, but the principle of proportiona*

[122] The doctrine of proportionality was likewise implicit in the Hong Kong approach to statutory presumptions in criminal law. Referring to statutory exceptions to the presumption of innocence, the Privy Council explained in *Lee Kwong-Kut* at pp 969–970:

> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. *The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important.* However what will be decisive will be the substance and reality of the

language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 LEd 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'. (Emphasis added.)

[123] Useful guidance can also be gleaned from the case of *R v Oakes*. The Canadian Supreme Court held that, in general, 'a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence', at para 57. The fact that the standard required to disprove the presumed fact is only on the balance of probabilities does not render the reverse onus clause constitutional, at para 58.

[124] Be that as it may, a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In this exercise, the Canadian Supreme Court in *R v Oakes* elaborated on the two central criteria that must be satisfied, at paras 69–70:

(a) the objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns; and

(b) the means chosen to achieve the objective must be reasonable and demonstrably justified, in that:

(i) the measure must be rationally connected to the objective;

(ii) the right in question must be impaired as little as possible; and

(iii) the effect of the measure must be proportionate to the objective.

[125] It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. We consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the state (see *Gan Boon Aun*).

[126] It is notable that the doctrine of proportionality and the all-pervading nature of art 8 form part of the common law of Malaysia, developed by our courts based on a prismatic interpretation of the FC without recourse to case law relating to the European Convention of Human Rights. As such we are therefore of the view that the appellants' assertion that art 5 confers an absolute

right upon an accused to be presumed innocent until proven guilty and not subject to the doctrine of proportionality while disregarding art 8, is unsupported by authority and without basis.

[127] To summarise, the following principles may be discerned from the above authorities:

(a) art 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt;

(b) the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused — art 8(1);

(c) a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary;

(d) the test of proportionality comprises three stages:

(i) there must be a sufficiently important objective to justify in limiting the right in question;

(ii) the measure designed must have a rational nexus with the objective; and

(iii) the measure used which infringes the right asserted must be proportionate to the objective;

(e) factors relevant to the proportionality assessment include, but are not limited to, the following:

(i) whether the presumption relates to an essential or important ingredient of the offence;

(ii) opportunity for rebuttal and the standard required to disprove the presumption; and

(iii) the difficulty for the prosecution to prove the presumed fact;

(f) a significant departure from the presumption of innocence would call for a more onerous justification.

THE CONSTITUTIONALITY OF SECTION 37A

[128] Section 37A was legislated to permit the invocation of the two presumptions yet there was no amendment to the wording in sub-s 37(da). As we have earlier noted, the Federal Court had held in *Muhammed Hassan* that based on the clear and unequivocal meaning of the statutory wording, 'deemed possession' under sub-s 37(d) cannot be equated to 'found possession' so as to

invoke the presumption of trafficking under sub-s 37(da). To do so would be contrary to the ordinary meaning of the statutory language. As such, despite the insertion of s 37A, a plain reading of the wording in sub-ss (d) and (da) does not permit the concurrent application of both the said presumptions in the prosecution of a drug trafficking offence.

[129] Anyway, even if Parliament had amended the wording in sub-s (da) in accordance with the judgment in *Muhammed Hassan*, the fundamental question of constitutionality remains. It is for the court to determine whether the substance and effect of the legislation in permitting the use of double presumptions is in line with the fundamental liberties provisions of the FC. It is to this central issue that we now turn.

[130] We now consider the presumption of innocence and the impact of the said section in relation to the relevant principles on proportionality test. But before doing so we keep in the forefront of our minds that where the constitutionality of a provision is challenged, there is a presumption in favour of constitutionality and the burden rests on the party seeking to establish that the provision is unconstitutional (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389, *Gan Boon Aun*).

[131] Meanwhile for clarity, the appellants' challenge to the constitutionality of s 37A is only in relation to the application of a presumption in addition to or in conjunction with another presumption. The constitutionality of a single presumption under sub-ss 37(d) or (da) is not challenged in the present appeals. Hence, we are not addressing it as an issue before us.

Nature of presumptions

[132] To determine the effect of s 37A, it is helpful first to consider generally the nature of presumptions. A true presumption takes effect when, upon the proof of one fact (the basic fact), the existence of another fact (presumed fact) is assumed in the absence of further evidence (see *C Tapper, Cross & Wilkins Outline of the Law of Evidence* (6th Ed, London: Butterworths, 1986) at p 39). 'The usual purpose of a presumption is to ease the task of a party who can adduce some evidence which is relevant to, but not necessarily decisive of, an issue'.

[133] Presumptions can be categorised into presumptions of law or presumptions of fact. The former involves actual legal rules, whereas the latter are no more than frequently recurring examples of circumstantial evidence (see

R v Oakes at para 20). It is often true that 'presumptions of law are nothing else than natural inferences or presumptions of fact which the law invests with an artificial or preternatural weight' (see *C Tapper, Cross & Tapper on Evidence* (12th Ed, Oxford: OUP, 2013) at p 135).

[134] Such is the case with the two presumptions in question in these appeals. For the presumption under sub-s 37(d), a person's custody or control of a thing containing a dangerous drug, proved as a fact, (the basic fact) is relevant to, but not decisive of, his possession and knowledge of the dangerous drug which need not be proved but merely deemed (the presumed fact).

[135] As for the presumption under sub-s 37(da), a person 'found' (which denotes the need first for an affirmative finding based on the evidence adduced) to be in possession of drugs exceeding a stipulated weight has a logical bearing on the inference of trafficking.

[136] The presumptions are largely a matter of logical inference. Indeed even without the statutory presumption under sub-s 37(da), a person caught in the act of conveying a quantity of drugs much larger than is likely to be needed for his own consumption would give rise to an irresistible inference that he was transporting them for the purpose of trafficking, in the absence of any plausible alternative explanation (see *Ong Ah Chuan* at p 667; s 2 of the DDA).

[137] The presumptions in s 37 are rebuttable. The phrase 'until the contrary is *proved* imposes a legal burden on an accused to prove on a balance of probabilities that he was not in possession and had no knowledge of the drug (sub-s 37(d)), or that he was not in possession up to the statutory limit in weight of the drug for the purpose of trafficking (sub-s 37(da)) (see *R v Oakes* at para 24). The weight of evidence required to rebut the presumption would depend on the circumstances of each case. For instance, as a matter of common sense, the larger the quantity of the drugs involved the stronger the inference that it was intended for the purpose of trafficking and thus the more convincing the evidence needed to rebut it (see *Ong Ah Chuan* at p 668).

[138] The word 'shall' in both subsections indicates that each of the presumptions is mandatory in nature. However, the word 'may' in s 37A suggests that the cumulative use of double or multiple presumptions is discretionary. But just because it is discretionary it does not ipso facto escape a constitutionality scrutiny.

[139] The effect of s 37A on the operation of the two presumptions is therefore as follows:

(a) once the prosecution proves that an accused had the custody and control of a thing containing a dangerous drug, the accused is presumed to have possession and knowledge of the drug under sub-s 37(d). The 'deemed possession', presumed by virtue of sub-s 37(d), is then used to invoke a further presumption of trafficking under sub-s 37(da), if the quantity of the drug involved exceeds the statutory weight limit;

(b) s 37A thus permits a 'presumption upon a presumption' (as aptly described in *Muhammad bin Hassan* at p 291); and

(c) as such for a charge of drug trafficking all that is required of the prosecution to establish a prima facie case is to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifts to the accused to disprove the presumptions of possession and knowledge (sub-s 37(d)) and trafficking (sub-s 37(da)) on a balance of probabilities.

[140] As to the legal burden upon an accused to rebut a presumption and the risk attached to it, the case of *R v Whyte* (1988) 51 DLR 4th 481 at p 493 (in a passage adopted by Lord Steyn in *R v Lambert* at para 37) is instructive. Dickson CJ said this:

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

[141] Hence, for the above reasons we are of the view that s 37A prima facie violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist.

[142] Next to consider is whether the incursion into the presumption of innocence under art 5(1) satisfies the requirement of proportionality housed under art 8(1).

Proportionality and s 37A

[143] The first stage in the proportionality assessment is to establish whether there is a sufficiently important objective to justify the infringement of the right, in this case the right to presumption of innocence. The legislative objective in inserting s 37A is to overcome the problem of the prosecution

failing to prove the element of trafficking as defined in the DDA. Drug trafficking has been a major problem in the country. It needs to be curbed. One way is to secure convictions of drug traffickers which can be considered a sufficiently important objective and one which is substantial and pressing.

[144] The second stage of the inquiry is to consider whether the means designed by Parliament has a rational nexus with the objective it is intended to meet. The effect of s 37A, as elaborated above, is to shift the burden of proof to an accused on the main elements of possession, knowledge, and trafficking, provided that the prosecution establishes first the relevant basic facts. It is at least arguable that the resulting ease of securing convictions is rationally connected to the aim of curbing the vice of drug trafficking. Bearing in mind that the validity of individual presumptions are not in issue in the present appeals, it is not necessary for us to analyse the rational connection between custody and control on one hand and possession and knowledge on another, or the connection between possession and trafficking (see *R v Oakes* at para 78).

[145] The third stage of the inquiry requires an assessment of proportionality. It must be emphasised any restriction of fundamental rights does not only require a legitimate objective, but must be proportionate to the importance of the right at stake.

[146] The presumptions under sub-ss 37(d) and (da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. We have already discussed this point earlier in this judgment. The actual effect of the presumptions is that an accused does not merely bear an evidential burden to adduce evidence in rebuttal of the presumptions. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In our view it is a grave erosion to the presumption of innocence housed in art 5(1) of the FC.

[147] But the most severe effect, tantamount to being harsh and oppressive, arising from the application of a 'presumption upon a presumption' is that the presumed element of possession under sub-s 37(d) is used to invoke the presumption of trafficking under sub-s 37(da) without any consideration that the element of possession in sub-s 37(da) requires a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence (see *Mohammed bin Hassan*).

[148] Section 37A was legislated to facilitate the invocation of the two presumptions yet there was no amendment to sub-s 37(da). As such and as discussed earlier on in this judgment, to invoke a presumption of trafficking

A founded not on *proof* of possession (which currently the subsection demands) but on *presumed* possession based on proof of mere custody and control, would constitute a grave departure from the general rule that the prosecution is required to prove the guilt of an accused beyond a reasonable doubt.

B **[149]** Further, the application of what may be termed the 'double presumptions' under the two subsections gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such C circumstance, it cannot be said that the responsibility remains primarily on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

[150] Based on the factors above — the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and D the cumulative effect of the two presumptions — we consider that s 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the seriousness of the E offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1).

F **[151]** Accordingly, we hold that s 37A is unconstitutional for violating art 5(1) read with art 8(1) of the FC. The impugned section is hereby struck down.

G **[152]** Having struck down s 37A of the DDA the question now is to determine the position of the appellants. The learned trial judges in these two appeals invoked both the presumptions in finding the guilt of the appellants. Since there was no challenge to the use of a single presumption in these appeals we are of the view that the invocation of sub-s 37(d) by the learned trial judges H did not cause any miscarriage of justice to the detriment of the appellants.

[153] Hence, we hereby quash the convictions and sentences of both the appellants under s 39B of the DDA. As we have no reasonable doubt on the guilt of the appellants for possession of the drugs based on the evidence I adduced we hereby substitute their respective convictions to one of possession under s 12(1) and punishable under s 39A(2) of the DDA.

Reported by Ashok Kumar